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In the Supreme Court of the United States

OCTOBER TERM, 1975

LUTHER ALBERT JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner brought this suit in the United States District Court for the Western District of Kentucky to enjoin the collection of a wagering excise tax assessment of $929,600 for the period July 1, 1968 through September 30, 1972. The district court denied petitioner's motion for a preliminary injunction and granted the government's motion for summary judgment on the ground that the action is prohibited by the Anti-Injunction Act, 26 U.S.C. 7421(a) (Pet. App. A 1a-8a). That Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The court of appeals affirmed *per curiam* (Pet. App. C 10a-11a).

1. The decision below correctly held that this action is barred by the Anti-Injunction Act. The statutory prohibition on injunctions against tax assessments or collection activities by the Treasury is subject to one narrowly limited exception created by this Court. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7, the Court unanimously held that a taxpayer could obtain an injunction only if he satisfied a two-fold test: first, he must show that "it is clear that under no circumstances could the Government ultimately prevail" on the merits of its legal claim; secondly, he must show that "equity jurisdiction otherwise exists" because of the threat of irreparable injury for which there is no adequate legal remedy. Recently, the Court reaffirmed the *Williams Packing* rule and upheld the bar of the Act against injunctive suits in connection with tax-exempt status. See *Bob Jones University* v. *Simon*, 416 U.S. 725; *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752.

Contrary to petitioner's argument (Pet. 6), the decision below is in complete accord with the standard established by *Williams Packing*. Petitioner failed to satisfy the *Williams Packing* test for injunctive relief. With respect to the first part of the two-fold test—that under no circumstances could the government ultimately prevail —petitioner merely alleges that there was no factual foundation for the assessment. However, the assessment was shown to have been based upon (1) petitioner's admission by guilty plea in a related criminal case that he was involved in gambling activities throughout the period of the assessment (Pet. App. A 2a, 6a-7a); and (2) the average daily wagers known to have been placed with petitioner's gambling operation over a nine-day period (Pet. App. A 2a).

The wagering excise tax assessment was calculated by projecting these average daily wagers over the assessment period. This method, necessitated by petitioner's lack of books and records from which the precise amount of the tax due might be computed, has long been held to be appropriate for determining wagering excise tax liability under similar circumstances. See, *e.g.*, *Collins* v. *Daly*, 437 F.2d 736 (C.A. 7); *Pinder* v. *United States*, 330 F.2d 119 (C.A. 5). The fact that petitioner alleges (Pet. 4) that he is unable to pay the total assessment and that collection attempts would result in his bankruptcy is an insufficient basis for his claim for injunctive relief. As the Court stated in *Enochs* v. *Williams Packing Co., supra*, 370 U.S. at 6, "such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise."

Moreover, unlike the assessment of income, estate and gift taxes which are reviewable in the Tax Court and must be paid in full as a prerequisite to maintaining a suit for refund, the Tax Court has no jurisdiction over assessments of wagering excise taxes. As a result, this Court has held that a suit for a refund of such an excise tax may be maintained with respect to any portion of the assessment because the assessment is "divisible". *Flora* v. *United States*, 362 U.S. 145, 171, n. 37; See also, *Vuin* v. *Burton*, 327 F.2d 967, 970 (C.A. 6). Thus, even if petitioner cannot pay the total assessment, he still has available a judicial remedy based upon payment of part of the assessment. See *Bob Jones University* v. *Simon, supra*, 416 U.S. at 746-748; *Alexander* v. *"Americans United" Inc., supra*, 416 U.S. at 761-762.

2. Contrary to petitioner's contention (Pet. 6-11), the decision below does not conflict with *Pizzarello* v. *United States*, 408 F.2d 579 (C.A. 2); *Lucia* v. *United States*, 474 F.2d 565 (C.A. 5) (*en banc*); or *Shapiro* v. *Secretary of State*, 499 F.2d 527 (C.A. D.C.), certiorari granted *sub nom. Commissioner* v. *Shapiro*, 420 U.S. 923. In *Pizzarello*, the Second Circuit relied upon *Williams Packing* in reversing the denial of an injunction against a gambling excise tax assessment which was based upon a five-year projection of wagering activity during a three-day period. In that case, however, the taxpayer had been indicted for operating a gambling establishment only for two weeks. Because of this obvious disparity in the time periods, the court found no proof in the record that the taxpayer operated as a gambler for five years (408 F.2d at 583). In enjoining the assessment as excessive, the court noted that the allegation that the taxpayer was engaged in gambling activity for five years was "unsupported either by the record or by affidavits" (*id.* at 584).

Petitioner has made no such showing in this case to cast doubt upon the correctness of the assessment, which is presumptively valid. See, *e.g.*, *Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Wickwire* v. *Reinecke*, 275 U.S. 101, 105; *Welch* v. *Helvering*, 290 U.S. 111, 115. Indeed, unlike *Pizzarello*, petitioner admitted by guilty plea that he was involved in gambling activities throughout the period covered by the assessment. Moreover, in a decision subsequent to *Pizzarello*, the Second Circuit has indicated that injunctive relief cannot be granted where, as here, there is some basis for concluding that the taxpayer was

engaged in gambling activity during the period in question. See, *Hamilton* v. *United States*, 429 F.2d 427 (C.A. 2), affirming, 309 F. Supp. 468 (S.D. N.Y.), certiorari denied, 401 U.S. 913.[1]

Lucia is similarly distinguishable. There, the taxpayer argued on appeal that the district court should not have dismissed his suit because he stood ready to demonstrate the error of a gambling excise tax assessment based upon a projection of wagering activity over four years and eight months. The Fifth Circuit remanded the case to the district court for a factual determination of the taxpayer's claim. Unlike *Lucia*, however, here the district court did not dismiss petitioner's suit but granted the government's motion for summary judgment only after considering the factual foundation for the assessment as set forth in affidavits. Petitioner did not submit any evidence challenging the correctness of the assessment.[2] Nothing in *Lucia* re-

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[1]Here, the evidence supporting the assessment was obtained through court-approved wiretaps, and the lawfulness of that evidence has been judicially determined in a criminal case involving petitioner. Moreover, petitioner's assertion (Pet. 9) that special agents of the Internal Revenue Service are not permitted to receive evidence obtained by wiretaps has been rejected by the Third Circuit in *United States* v. *Iannelli*, 477 F.2d 999.

[2]Petitioner filed affidavits (R. 81-95) alleging that his guilty plea in the criminal proceedings arising from the same alleged activities was not intended as an admission of guilt, and denying certain facts set forth in the revenue agent's affidavit. He did not, however, deny that he was engaged in gambling during this period, or deny the inferences drawn by the revenue agent with respect to his liability for federal wagering taxes. In challenging (Pet. 9-10) the affidavits filed by the government (R. 34-88) on the ground that they are based on hearsay, petitioner misconceives their purpose. These affidavits were not presented to establish the correctness of the assessment, but simply to show the factual foundation for the assessment, in order to establish that there was a likelihood that the government would prevail on the merits of its claim. "R." references are to the joint appendix in the court of appeals.

quires that petitioner be given another opportunity to retry his suit. Moreover, the Fifth Circuit's more recent decision in *Carson* v. *United States*, 506 F.2d 745, indicates that petitioner's failure to deny that he was engaged in the business of accepting wages is a sufficient ground for distinguishing *Lucia*.[3]

Finally, the decision below does not conflict with *Shapiro* v. *Secretary of State, supra*. Unlike this case, the record in *Shapiro* did not disclose the basis of the assessment and the case was remanded by the court of appeals to allow the district court to develop a record upon which to rule on the government's motion to dismiss. While we believe that *Shapiro* erred in holding that the Commissioner was required to prove the facts upon which his assessment was based before the bar of the Anti-Injunction Act is applicable, the record in this case fully supported the district court's conclusion that petitioner did not demonstrate that "under no circumstances" would the government prevail on the merits of its claim within the meaning of the *Williams Packing* exception.[4]

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[3]Throughout these civil proceedings petitioner has never denied his gambling activities, but merely stated "he does not admit" these activities (Pet. App. A 3a).

[4]*Hall* v. *United States*, 493 F.2d 1211 (C.A. 6), certiorari granted, 419 U.S. 824, reargument ordered, June 23, 1975, No. 74-75; *Laing* v. *United States*, 496 F.2d 853 (C.A. 2), certiorari granted, 419 U.S. 824, reargument ordered, June 23, 1975, No. 73-1808; and *Rambo* v. *United States*, 492 F.2d 1060 (C.A. 6), petition for certiorari pending, No. 73-2005, cited by petitioner (Pet. 12), are not on point. Those cases present the question whether the Commissioner is required to issue a notice of deficiency to the taxpayer in connection with the termination of a taxable year under Section 6851. Here, the assessment was made in accordance with Section 6862, which permits the Commissioner to make jeopardy assessments of taxes not within the jurisdiction of the Tax Court. A notice of deficiency is not, in any event, required to be issued in connection with assessments of such taxes.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.